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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

NO. 88-581

v.

REGINALD DEAN STILL,

Respondent.

_____/

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT REGINALD DEAN STILL

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QUESTION PRESENTED FOR REVIEW

Has the government proved every element of attempted bank robbery when it has established no more than the defendant's confession he intended to rob some unspecified bank, his possession of a disguise, a hoax bomb and a demand note and his presence near several banks and retail establishments?

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The United States (the Government) seeks review of a decision by the United States Court of Appeals for the Ninth Circuit reversing the attempted bank robbery conviction of Respondent Reginald Dean Still (STILL). The Ninth Circuit found no evidence STILL took a "substantial step" toward committing a bank robbery and, accordingly, no basis for upholding a conviction of attempted bank robbery.

The Government argues the Ninth Circuit's standard for determining if the defendant has taken a "substantial step" toward committing a bank robbery differs from that of four other circuits. The posited conflict does not exist. The Ninth Circuit applied the same standard utilized in the other circuits to a unique set of facts. Even assuming its conclusion differs from that another circuit would reach if faced with these same facts, this hypothetical difference in result within such a fact-specific context does not merit review here. Finally, the Ninth Circuit did not reach questions STILL presented which would require reversal of his conviction regardless of this Court's resolution of the issue the Government raises.

The petition for a writ of certiorari should be denied.

OPINIONS BELOW

A revised opinion of the court of appeals is reported at 850 F.2d 607; its initial opinion at 837 F.2d 871. Their resolution of the issue presented in the petition does not differ.

JURISDICTION AND RELEVANT STATUTES

This Court's jurisdiction, 28 U.S.C. §1254(1), and the Government's identification of the statute involved in this petition, 18 U.S.C. §2113(a), are uncontested.

STATEMENT OF FACTS[1]

On August 7, 1985, Kelli Ross went shopping at the Roseville Square Shopping Center (the Shopping Center) in Roseville, California. The Shopping Center contains a Safeway Grocery Store, Richardson's Clothing Store, Firestone Tire Center, Security Pacific Bank, a pizza parlor, an attorney's office, a book store and various other storefront operations. RT 61-62. As Ross walked toward a store at approximately 10:30 a.m., STILL walked past her and got into the passenger side of a van parked next to her vehicle. The van was parked several hundred feet away from the Security Pacific Bank. A short time later, Ms. Ross returned to her vehicle. As she approached, she observed STILL in the passenger side of the van putting on a blonde wig. RT 3-12. Fearing STILL might be a rapist, she telephoned the police. RT 21-24.

Officer Hensley of the Roseville Police Department was dispatched to the shopping center parking lot in response to Ms. Ross's call. Hensley was told a bald-headed man was in a van putting on a wig. He was not given the license plate number of the van. RT 64-68. Hensley parked his marked patrol vehicle facing the front of the van. He saw STILL emerge from the rear interior of the van, sit down in the driver's seat, place the vehicle in reverse and drive off. RT

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[1]The statement of facts presented by the Government in the petition is accurate though incomplete. A more extensive statement of facts is set forth here to better demonstrate the Government failed to introduce evidence STILL took a "substantial step" toward robbing a particular bank.

33-37. There was nothing remarkable in how STILL exited the parking space and drove away. RT 66-67.

Officer Hensley followed the van, activating his red lights and siren before it left the Shopping Center parking lot. Although he gave chase, Hensley then lost sight of the van. The abandoned van was later found parked between two houses. RT 39-43. Other officers arrived at the scene and a neighborhood search began. STILL was found inside the shower of a self-contained camper/trailer which was parked in a nearby backyard. RT 52-54. STILL was placed under arrest for possession of stolen property. Hensley believed that, prior to placing STILL under arrest, he had learned that the license plates on the van did not belong to the van. STILL was not advised of the reason for his arrest until he arrived at the police station. RT 72-73.

While in custody and waiting to be booked, STILL allegedly volunteered "You did a good job. You caught me five minutes before I was going to rob a bank. That's what I was putting the wig on for." After the booking process was complete, STILL allegedly stated: "The van is stolen. How much do you get for auto theft around here?" RT 58.

Detective Stump of the Roseville Police Department then advised STILL of his Miranda rights, had him sign a written waiver and interrogated him. According to Detective Stump, STILL said he was preparing to rob an unspecified bank when a marked police vehicle approached his van. STILL allegedly indicated he planned to place a phony explosive device along with a note in the drive up window of the bank. STILL described the bank as a large, two-story bank made of brown or reddish-color brick. RT 85-86. Thirty-nine banks are located within five miles of the Shopping Center parking lot, five of these within a thousand yards of STILL's van. RT 147.

A search of STILL's van uncovered a hoax bomb, a folder containing a typed and handwritten note, a demand note, a crumpled demand note, a blonde wig, a police scanner, a scanner guide, a seven page bomb extortion note for a hotel,

and two plastic boxes containing electronic parts. On the driver's side floorboard were sketches of the Citizen's Bank of Roseville and a Del Taco Restaurant. RT 94, 96, 101, 157, 98, 100, 160, 161, 164, 199-202. Both the police scanner and the hotel extortion note were found in the rear of the van. RT 193 & 201.

Later that day, STILL allegedly made further incriminating statements to Agent Maples of the United States Secret Service and Agent White of the F.B.I. STILL purportedly said he stole the van, planned to rob the bank and tried to elude the police. RT 206-212, 232. The agents were allegedly told STILL planned to place a hoax bomb on the drive up window of the bank and use a note to demand money from the teller. STILL also supposedly explained to Agent Maples how the van was stolen in Missouri during July of 1985. Rt 214.

After his arrest, Dr. Globus conducted two psychiatric examinations of STILL and diagnosed him as a chronic paranoid schizophrenic. RT 503-506.

STATEMENT OF THE CASE

STILL was charged with the attempted robbery of the Security Pacific Bank and interstate transportation of a stolen van from Jefferson, Missouri to Roseville, California.

At trial, the Government introduced the following items found in STILL's van: the hoax bomb, a demand note, a memo book with draft demand notes, a crumpled demand note, a blonde wig, a police scanner, a map of Citizen's Bank[2], a scanner guide, a plastic tool box with timer, a plastic tool box containing transistors, a county map, a board for making driver's licenses, and nine fake driver's licenses. Several law enforcement officers testified to STILL's statements concerning his preparations to rob a bank.

To establish STILL's long-standing psychiatric disorders, two psychiatrists, a social service counselor, an attorney and two lay witnesses were called and testified as to STILL's mental state as far back as 1971. Dr. Globus testified to his

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[2]STILL was, of course, charged with attempting to rob Security Pacific Bank, not Citizen's Bank.

conclusion that STILL suffered from paranoid schizophrenia. This testimony was contradicted by two rebuttal experts in psychiatry offered by the government.

The jury found STILL guilty on both counts of the indictment. The Court sentenced STILL to fifteen years for the attempted bank robbery and five years probation on the stolen vehicle charge. The Court recommended STILL receive psychiatric assistance and treatment while in custody.

The Ninth Circuit found no evidence of a "substantial step" toward the robbery of the Security Pacific Bank, reversed STILL's conviction for attempted bank robbery and affirmed his conviction for transportation of a stolen vehicle. The Government's petition for rehearing on the attempt issue was denied. STILL's petition for rehearing on the sanity issue was denied.

ARGUMENT

A. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS

The Government relies on four cases to establish the Ninth Circuit's analysis of attempt issues is inconsistent with the standard applied to attempted bank robbery in four other circuits. Petition at 8-10.

The Ninth Circuit follows the attempt analysis formulated by the Fifth Circuit in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). See United States v. Still, 850 F.2d 607, 608 (9th Cir. 1988); United States v. Buffington, 815 F.2d 1292, 1301 (9th Cir. 1987). Two of the cases cited by the Government as conflicting with the Ninth Circuit's analysis specifically follow Mandujano. See United States v. Jackson, 560 F.2d 112, 117 (2d Cir.), cert. denied, 434 U.S. 941 (1977); United States v. McFadden, 739 F.2d 149, 152 (4th Cir.), cert. denied, 469 U.S. 920 (1984).

The Court in Mandujano held that an attempt required proof of: (1) the "culpability otherwise required for the commission of the crime which he is charged with attempting;" and (2) "conduct which constitutes a substantial step toward

commission of the crime." 499 F.2d at 376. The conduct must be "strongly corroborative of the firmness of the defendant's criminal intent." Id. The Court in Mandujano considered its formulation "generally consistent with and our language is in fact close to the definitions proposed by the ... American Law Institute's Model Penal Code." Mandujano, 499 F.2d at 377 n.6. Accordingly, the Ninth Circuit, which follows Mandujano, does not (as the Government insists) reject the Model Penal Code formulation for attempt.

The Eight Circuit case cited by the Government as inconsistent with the Ninth Circuit, United States v. Crawford, relies upon earlier circuit precedent for its attempt analysis. 837 F.2d 339, 340 (8th Cir. 1988)(citing United States v. Mims, 812 F.2d 1068 (8th Cir. 1987)). Mims in turn relied upon earlier Eighth and Tenth Circuit precedent. 812 F.2d at 1077 (citing United States v. Joyce, 693 F.2d 838 (8th Cir. 1982) & 1078 (citing United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979)). Both Joyce and Monholland squarely derive their analysis from Mandujano. 693 F.2d at 841 (citing Mandujano) & 607 F.2d at 1319-20 (citing Mandujano). While the road is tortuous, it is clear the Eight Circuit applies the same test to attempts as the Ninth Circuit.

The Seventh Circuit case cited by the Government follows a case decided before Mandujano. See United States v. Schramm, 715 F.2d 1253, 1254 (7th Cir. 1983), cert. denied, 466 U.S. 930 (1984) (citing Rumfelt v. United States, 445 F.2d 134 (7th Cir. 1971)). Although decided four years before Mandujano, Rumfelt relies upon the same authority, e.g., United States v. Baker, 129 F.Supp. 684 (S.D.Cal. 1955) & People v. Buffum, 40 Cal.2d 709 (1953), to formulate a nearly identical standard. Compare Rumfelt, 445 F.2d at 136 ("'there must be some appreciable fragment of the crime committed .... the act must not be equivocal in nature,'" quoting Buffum at 718) with Mandujano at 376-77 (identical quote). The Ninth Circuit has cited Rumfelt with approval. See Buffington, 815

F.2d at 1302. In short, the four circuit cases cited by the Government as well as the Ninth Circuit apply identical or nearly identical tests to attempt issues.

What the Government is really saying is that it disagrees with the results the Ninth Circuit produces when it applies the Mandujano/Model Penal Code test. Rather than admit to this weak position, the Government has instead argued the Ninth Circuit utilizes a different test. Applying the Mandujano/Model Penal Code test, the cases cited by the Government are clearly distinguishable from that of STILL.

B. THE STANDARD GOVERNING ATTEMPTS APPLIED BY THE FIVE CIRCUITS YIELDS IDENTICAL RESULTS WHEN PROPERLY ANALYZED

The overriding distinction between the four cases cited by the Government and this case is the evidence of criminal conduct directed toward a specific bank in each of the four. The conduct of the defendants in those four cases "cross[ed] the boundary between preparation and attempt." United States v. Buffington, 815 F.2d at 1303.

In Crawford, the government introduced evidence obtained from a confidential informant, a co-conspirator in the planned robbery, that the defendants' acts were directed toward a specific bank. 837 F.2d at 339. The "getaway" room where the paraphernalia to be used in the robbery in Schramm were stored was located in the same building as the target bank. 715 F.2d at 1255. The defendants in McFadden were captured on tape admitting a series of robberies of branch banks in isolated areas. 739 F.2d at 150-51. The attempt was in the vicinity of a similarly isolated fourth branch bank. Id. at 151. The defendants in Jackson were infiltrated by an informant who testified to two separate attempts directed to the same bank. 560 F.2d at 114-116.

In contrast, while the Ninth Circuit found evidence STILL intended to rob the Security Pacific Bank, there was no conduct specifically directed toward that bank. As noted above, STILL sat within five miles of thirty-nine banks and within one thousand yards of five banks. There were numerous

other retail establishment in similarly proximity. Without either movement or the equivalent of movement toward the Security Pacific Bank, there was no conduct directed toward the robbery of that particular bank. "[U]ntil the corroborative step is taken, there is insufficient indication, or proof, that the actor would actually follow through on a criminal design, even if that design has been affirmatively expressed." United States v. Dworkin, 855 F.2d 12, 17 n.3 (1st Cir. 1988). Until such focused conduct, there was no unequivocal "substantial step" taken toward robbing that particular bank. There was no fragment of the robbery of that particular bank.

For example, if STILL were accused of attempting to board an airline flight without a ticket, evidence he went to the airport, did not buy a ticket and sat in the waiting area would not suffice to convict him. The Government would be required to prove he made some movement toward boarding a particular plane or the equivalent of such movement (threatening a ticket agent, for example). Unfocused conduct, regardless of specific intent to accomplish a crime, is not an attempt to commit that crime.

C. ASSUMING THE NINTH CIRCUIT IMPROPERLY APPLIED THE STANDARD GOVERNING ATTEMPTS, THIS ISOLATED ERROR DOES NOT MERIT THE GRANTING OF THE GOVERNMENT'S PETITION

This Court does not sit to correct isolated instances of error in the application of a proper legal standard. See, e.g., Ross v. Moffitt, 417 U.S. 600, 616-17 (1974); Stern, Gressman & Shapiro, Supreme Court Practice 217-20 & 221-24 (1986 ed.). As noted above, the Ninth Circuit's standard for analyzing attempts is the same as that applied in four other circuits. Since the standard applied is proper, its misapplication to these facts, if it occurred, is not grounds to grant review.

D. THERE IS NO POLICY REASON TO GRANT REVIEW IN THIS CASE

The Government argues the Ninth Circuit's approach to attempted bank robbery forces law enforcement officials to

wait until the potential robbers are in close physical proximity to the target bank before intercepting them. This forced decision to wait until the potential robbers are "near" the bank will supposedly lead to greater danger to the public. The Government's argument not only misstates the Ninth Circuit's approach but confuses the question of when law enforcement can arrest a suspect with when that suspect commits the crime of attempt.

As noted above, the Ninth Circuit's approach does not require physical proximity, instead it (like the other circuits) requires some unequivocal conduct directed toward the criminal objective. If, as posited by the Government, law enforcement knows certain individuals are to rob a particular bank (through an informant or otherwise), there is evidence to demonstrate the defendants' conduct is directed toward a criminal goal without physical proximity. An arrest is proper and an attempt has occurred.

In STILL's case, his conduct was no doubt suspicious enough to merit police inquiry, if not arrest. At the time he was arrested, however, he had not attempted to commit a crime. Certainly no one had been endangered by STILL's overt act of placing a long blonde wig on his head. Likewise, that act did not demonstrate an unequivocal intent to rob a bank or anything else for that matter. While persons brandishing firearms or otherwise threatening others can be arrested for that fact alone, the citizen who harbors thoughts of bank robbery but who takes no substantial step toward converting those thoughts to reality has not endangered anyone. More importantly, a person harboring evil thoughts which he has not converted into evil acts has committed no crime.

The Government's "practical" policy argument would not only allow the arrest of persons who had taken no substantial step toward committing a crime but would convict them of an attempt to commit a crime. This "practical" policy would punish as a criminal attempt "thinking about robbing a bank." Under such a policy, a great many of us are criminals.

E. WERE THE COURT TO GRANT REVIEW, THE JUDGMENT BELOW WOULD NONETHELESS BE AFFIRMED ON GROUNDS THE NINTH CIRCUIT DID NOT REACH

The Ninth Circuit never reached the question of whether STILL's conduct ever rose to the level of "attempted" bank robbery by "force, violence or intimidation." Were this Court to grant the petition and remand for application of a different standard governing attempts, the result would not change for the Ninth Circuit would STILL be required to reverse for insufficiency of the evidence on another ground.

18 U.S.C. §2113 reads in relevant part:

> "(a) whomever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association. . ."
> (Emphasis added.)

In United States v. Baker, 129 F.Supp. 684, 686 (S.D. Cal. 1955), the Court examined the language above and stated that "the attempt relates to the taking and not to the intimidation. Thus, what is involved in this indictment is an attempted taking by intimidation, the means being intimidation, or putting in fear instead of by force." (Emphasis added).

In Baker, supra, the defendant had passed a note to the bank teller who later testified as being nervous though she had herself scared off the defendant before he received any money. The Baker Court held that in a prosecution for attempted bank robbery, when no force is used, the only determination is:

> "Whether the defendant did knowingly and willfully by intimidation attempt to take from the person or presence of another money in the care, custody and control of a bank whose deposits are insured by the Federal Deposit Insurance Corporation."

In the present case, there was no force, no threats and no intimidation. Intimidation "must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear." United States v. Baker, supra, at 686. At no

time did STILL ever attempt to confront anyone, let alone attempt to take anything by force and violence from the Security Pacific Bank. No one from the bank ever saw STILL. In fact, the lay witness who contacted the police based on what she considered to be STILL's suspicious behavior, felt he might be a rapist, not a bank robber. The officer who arrived on the scene and ultimately arrested STILL arrested him for possession of stolen property, not attempted bank robbery. It is abundantly clear that no one observing STILL's conduct was at any time intimidated or even thought that he was about to rob a bank, let alone the Security Pacific Bank.

No circuit has apparently addressed whether force and violence or intimidation must be established in order to sustain a conviction for attempted bank robbery pursuant to Title 18 U.S.C. §2113(a). In construing a statute in the case of first impression, this Court will first look to the language of the statute itself and second, to the statute's legislative history. This analysis is overshadowed by the fundamental principle that criminal statutes are to be construed narrowly. FCC Company v. American Broadcasting Company, 347 U.S. 284, 296 (1954). In construing the statute narrowly, the plain meaning of the words used controls, absent a clear expressed legislative intent to the contrary. Powell v. Tuscon Air Museum Foundations of Pima County, 771 F.2d 1309, 1311 (9th Cir. 1985).

A plain, common sense, reading of 18 U.S.C. §2113(a) makes it abundantly clear that force and violence or intimidation must be established in order to sustain a conviction for either bank robbery or attempted bank robbery. As the Court in Baker reasoned, the attempt relates to the taking and not to the intimidation, force or violence. In this case, there was absolutely no display of force, violence or intimidation.

CONCLUSION

The Ninth Circuit applied in this case the same standard governing attempts applied within the other circuits. It reached the unremarkable conclusion that the Government had failed to introduce evidence establishing STILL had crossed the line between preparation and attempt by directing actual conduct toward his criminal goal. Presumably the other circuits applying this same test would reach the same result.

Assuming this Court would reach a different result applying the same standard to these facts, this nonetheless does not merit the granting of certiorari. This Court sits to establish uniformity rather than to correct isolated error. The standard applied by the Ninth Circuit is correct.

Were the Court to grant certiorari and remand for application of a different standard, remand would likely make no difference in this case. The government not only failed to introduce evidence of conduct directed toward a specified criminal goal, it also failed to introduce evidence of the threatened force, violence or intimidation needed to establish an attempted bank robbery.

The petition for certiorari should be denied.

DATED: January 17, 1989

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